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A Fake Right of Priority Under the Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation

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ARTICLES

A FAKE RIGHT OF PRIORITY UNDER THE CROSS-STRAIT AGREEMENT ON INTELLECTUAL PROPERTY RIGHT PROTECTION AND COOPERATION

PING-HSUN CHEN*

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I. INTRODUCTION

On June 26, 2010, Taiwan and China entered into the *Cross-Straits Economic Cooperation Framework Agreement* (兩岸經濟合作架構協議, *liang-an jing-ji he-zuo jia-gou xie-yi*) (ECFA), which was overwhelmingly claimed to be a major step in the Taiwan-China relationship.¹ Because of the “One-China” policy, even before Taiwan joined the World Trade Organization (WTO), China tried to boycott the WTO membership application of Taiwan.² When Taiwan started to negotiate for its entry into the General Agreement on Tariffs and Trade (GATT) (a predecessor of the WTO), the Chairman of the GATT Council clarified that because of the “One-China” policy, Taiwan could not join the GATT until China finished its accession.³ When China proposed its accession, it tried to persuade other WTO members to characterize Taiwan as a “Separate Customs Territory of China,” but that failed because of the opposition from the United States.⁴ After Taiwan joined the WTO, China constantly refused to negotiate with Taiwan about trade matters under the WTO framework because it was afraid of an impression that Taiwan is a sovereign

1. See, e.g., Paul J. Davidson, *The Cross-Straits Economic Cooperation Framework Agreement: Legal Issues*, 29 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 44, 45 (2011); Chi-An Chou, Comment, *A Two-Edged Sword: The Economic Cooperation Framework Agreement Between the Republic of China and the People's Republic of China*, 6 BYU INT'L L. & MGMT. REV. 1, 4 (2010).

Taiwan and China has been in a conflict with each other since 1949. From 1945 to 1949, the Government of the Republic of China (ROC) led by the Chinese Nationalist Party (also known as Kuomintang of China, KMT) gradually lost its territorial control in China to the Communist Party of China (CPC). Finally, the military force of CPC conquered the Chinese territory and established the People's Republic of China (PRC). Later, KMT led by Chiang Kai-Shek fled to Taiwan with many Chinese refugees under the assistance of the United States and re-established its political regime within Taiwan in 1949. To clean the force of Chiang Kai-Shek in Taiwan, China used its military operations to attack Kinmen Islands in the early 1950's. Eventually, China failed because of the intervention of the United States. Since then, Chiang Kai-Shek continued to call his group ROC as a legitimate government of China, which creates a form of a divided country or “Two Chinas” that is not recognized now under international law. However, China has never stopped its intent to conquer Taiwan. The intent has become more aggressive since China gained its position in the United Nations in 1971. See generally Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT'L L. REV. 99, 141–56 (2003); Jordan J. Paust, *UN Principles in Theory and Practice: Time for Taiwanese Self-Determination to Ripen into More Widely Recognized Statehood Status and Membership in the UN and the Prohibition of Armed Force Against Taiwan*, in MEMBERSHIP FOR TAIWAN IN THE UNITED NATIONS 3, 3–5 (Lung-Chu Chen ed., New Century Institute Press 2007); Miyazaki Takashi, *Recognition of States and Governments in International Law: Theory and Practice*, 28 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 64, 66–67 (2010).

2. See, e.g., Phoenix X. F. Cai, *Trading with Foreigners: An Interdisciplinary Analysis of China's Core Interests in Trade and Foreign Policy*, 47 AKRON L. REV. 809, 820–21 (2014); Qingjiang Kong, *Cross-Taiwan Strait Relations: What are the Legitimate Expectations from the WTO?*, 14 MINN. J. GLOBAL TRADE 91, 97–100 (2004).

3. See Steve Charnovitz, *Taiwan and the World Trade Organization*, in MEMBERSHIP FOR TAIWAN IN THE UNITED NATIONS 47, 48–49 (Lung-Chu Chen ed., New Century Institute Press 2007).

4. See Kong, *Cross-Taiwan Strait Relations*, *supra* note 2, at 98.

country and is not part of China.⁵ China made its best efforts to keep its trade talk with Taiwan as an internal Chinese matter.⁶ Finally, in 2008, China got a chance to implement its agenda because the pro-China party KMT won the presidential election in Taiwan.⁷ China began its trade negotiations with the KMT-led government while both parties treated the negotiations as an internal matter.⁸ As a result, the ECFA was signed.

The ECFA is unique in terms of intellectual property protection. Contrary to other free trade agreements (FTAs) signed by both nations, no intellectual property clause was included in the ECFA.⁹ Instead, the two countries signed a separate *Cross-strait Agreement on Intellectual Property Rights Cooperation and Protection* (海峽兩岸智慧財產權保護合作協議, *hai-xia liang-an zhi-hui cai-chan-quan bao-hu he-zuo xie-yi*) (Cross-Strait IP Agreement).¹⁰ This significant feature indicates that both nations agree with some form of “One China,” which unfortunately has restrained Taiwan from developing a formal, diplomatic relationship with other nations for decades.¹¹

The Cross-Strait IP Agreement was renowned for China’s admission of a right of priority of Taiwanese applications for patents, trademarks, and plant varieties.¹² In fact, under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), China should have been obligated to admit a right of priority of Taiwanese applications.¹³ But, China

5. *See id.* at 98–100.

6. *See id.* at 100.

7. *See* Chou, *supra* note 1, at 3.

8. *See id.* at 3–6.

9. Ping-Hsun Chen, *Cross-Straits Economic Cooperation Framework Agreement, Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation, and Implications of One-China*, 36 HOUS. J. INT’L L. 59, 63–64 (2014); *see generally* Press Release, Executive Yuan of Taiwan, Big Step Forward in Cross-Strait Intellectual Property Protection (Sept. 16, 2014), http://www.ey.gov.tw/pda_en/News_Content.aspx?n=1C6028CA080A27B3&sms=E0588283EFAA02AD&s=C3A24BACC0E7BA38.

10. *See* Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 94.

11. *See, e.g., id.* at 91–97; *see also* Vincent Y. Chao, *ECFA: No ‘One China’ Prerequisite: DPP*, *TAIPEI TIMES*, (July 1, 2010, <http://www.taipeitimes.com/News/taiwan/archives/2010/07/01/2003476824>) (“Strait Exchange Foundation Chairman Chiang Pin-kung (江丙坤) said the ‘1992 consensus’ was the basis for cross-strait negotiations.”); Xin Qiang, *Mainland China’s Taiwan Policy Adjustments*, 5 *CHINA SECURITY* 55, 57 (2009) (“On March 3, 2008, for the first time, Hu Jintao told US President George W. Bush that the mainland looked forward to restoring consultation and talks on the basis of the ‘1992 consensus,’ which sees both sides recognize there is only one China, but agree to differ on its definition.”).

12. *See* Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 94.

13. *Id.* at 94–96; *see* Pasha L. Hsieh, *The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law*, 14 *J. INT’L ECON. L.* 121, 124 (2011).

had never fulfilled such obligation. China's special concern was that a right of priority is rooted from the Paris Convention for the Protection of Industrial Property (Paris Convention), which only allows a state to join; thus, by admitting a right of priority of Taiwanese applications, China may admit the statehood of Taiwan directly or indirectly.¹⁴ As a result, this special concern was codified in the Cross-Strait IP Agreement.

The Paris Convention was signed in 1883 after a long period of negotiations.¹⁵ A union was formed to harmonize the legal protection on patents, trademarks, and industrial designs.¹⁶ The Paris Convention established two fundamental principles: national treatment and a right of priority.¹⁷ While the national treatment doctrine requires a member country to treat its own citizens and foreign nationals of other member country equally,¹⁸ the right of priority helps an applicant establish a universal filing date of the same subject matter in her own country as well as in other member country.¹⁹ Both principles were intended mainly to increase foreign patenting by eliminating obstacles against foreign patent applicants.²⁰

Articles 2 and 3 of the Paris Convention govern the principle of national treatment.²¹ In terms of protection of industrial property under domestic laws,

14. Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 94–96; Hsieh, *supra* note 13, at 124–25.

15. Paris Convention for the Protection of Industrial Property, opened for signature Mar. 20, 1883, as rev. at Stockholm, July 14, 1967 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. See R. Carl Moy, *The History of the Patent Harmonization Treaty: Economic Self-Interest as an Influence*, 26 J. MARSHALL L. REV. 457, 478 (1993).

16. See Daniel Lifschitz, Notes and Comments, *The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew*, 34 LOY. L.A. INT'L & COMP. L. REV. 197, 201–02 (2011); see also M. Bruce Harper, *TRIPS Article 27.2: An Argument for Caution*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 381, 390 (1997).

17. Paris Convention, *supra* note 15. Amy E. Carroll, Comment, *Not Always the Best Medicine: Biotechnology and the Global Impact of U.S. Patent Law*, 44 AM. U. L. REV. 2433, 2456 (1995).

18. Moy, *supra* note 15, at 484–85.

19. *Id.* at 482–83.

20. See *id.* at 481–82.

21. Paris Convention, *supra* note 15, at arts. 2, 3. See G. H. C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED AT STOCKHOLM IN 1967 27, 33 (BIRPI 1968). The doctrine of national treatment is also addressed in Article 3 of the TRIPS Agreement, which requires a member state to treat nationals of other member states “no less favorable” than its own nationals. See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3.1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULT OF THE URUGUAY ROUNDS vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. (“Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the

Article 2 requires a member state to treat nationals of any other member state as its own nationals.²² Article 3 extends the national treatment to nationals of countries outside the Union as long as they “are domiciled or [they] have real and effective industrial or commercial establishments in the territory of [a member state].”²³

The right of priority is vested in Article 4 of the Paris Convention.²⁴ Under Article 4, the right of priority is a right granted to a foreign applicant for a patent, trademark, or industrial design.²⁵ Such priority right mandates a member state to treat the filing date of the prior application filed in any foreign country as the filing date of the domestic application for the same subject, if such foreign country is also a member state.²⁶

Treaty on Intellectual Property in Respect of Integrated Circuits.”). In other words, Article 3 of the TRIPS Agreement allows a member state to grant more protection to foreign right owners than domestic right owners. See Thomas Cottier & Christophe Germann, *Agreement on Trade-Related Aspects of Intellectual Property Rights (Articles 1-8)*, in CONCISE INTERNATIONAL AND EUROPEAN IP LAW 5, 16–17 (Thomas Cottier & Pierre Véron ed., 2011).

22. See Paris Convention, *supra* note 15, at art. 2(1) (“Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.”). Article 2 mandates a member state to offer “all without prejudice to the rights specially provided for by” the Paris Convention. See *Id.* at art. 2(1). However, Article 2 does not require a member state to grant to its own nationals all the rights under the Paris Convention. See BODENHAUSEN, *supra* note 21, at 31 (“The protection of a national in his own country depends on the domestic legislation of that country and such national will therefore not be able to claim application of the Convention in his own country unless its legislation entitles him to do so.”). That may create “national discrimination.” See Martin Pflüger, *Paris Convention for the Protection of Industrial Property (Articles 1-3)*, in CONCISE INTERNATIONAL AND EUROPEAN IP LAW 191, 207 (Thomas Cottier & Pierre Véron ed., 2011).

23. See Paris Convention, *supra* note 15, at art. 3 (“Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.”). This rule for nationals of non-member states is based on the principle of territoriality. See Pflüger, *supra* note 22, at 209. Contrarily, Article 2 does not require “domicile or establishment” for nationals of member states. See Paris Convention, *supra* note 15, at art. 2(2) (“However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.”).

24. See BODENHAUSEN, *supra* note 21, at 35; see also Bryan S.T. Tan & Benjamin Cheong, *Windows into the Middle Kingdom: A Peek into the Importation and Sale of Software in China*, 7 SING. J. INT’L & COMP. L. 127, 145–46 (2003).

25. See BODENHAUSEN, *supra* note 21, at 35.

26. See *id.* at 41; see also Cynthia Smith, Note, *A Practical Guide to Chinese Patent Law*, 29 SETON HALL LEGIS. J. 643, 656 (2005); see generally Luigi Russi & Oliver Mirsch, *General Motors v. Chery: A Judicial Lesson for Foreign Operators in China*, 8 WAKE FOREST INTELL. PROP. L.J. 39, 59–60 (2007).

China has been a member state of the Paris Convention since 1985,²⁷ but Taiwan is not. Since both countries joined the WTO, several provisions of the Paris Convention have become binding to both countries under the TRIPS Agreement.²⁸ Article 2(1) of the TRIPS Agreement provides that “[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).”²⁹ Therefore, China should comply with Articles 2, 3, and 4 of the Paris Convention and grant the rights under those articles to Taiwanese applicants for industrial property. In other words, China should have granted a right of priority to an application.

While the Cross-Strait IP Agreement grants some form of a right of priority, this article is intended to explain that China has not granted to Taiwan applicants a real right of priority under the Paris Convention. In this article, Part II introduces a right of priority under the Paris Convention. Particularly, Part II describes the fundamental features of a right of priority. Then, Part III analyzes the “right of priority” provision of the Cross-Strait IP Agreement. Part III also addresses several distinctive features of the Cross-Strait IP Agreement and its formation, which may reflect China’s unspoken concern. Part IV discusses China’s implementation of the Cross-Strait IP Agreement and argues that China offers to Taiwan a fake right of priority.

II. A RIGHT OF PRIORITY UNDER THE PARIS CONVENTION

A. Eligibility

1. Applicants

A right of priority is vested in Article 4 of the Paris Convention, which includes several sub-provisions. Article 4(A)(1) provides that

27. See Edward Eugene Lehman, Camilla Ojansivu, & Stan Abrams, *Well-Known Trademark Protection in the People’s Republic of China—Evolution of the System*, 26 FORDHAM INT’L L.J. 257, 258 (2003).

28. See Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 94–96. Kong Qingjiang, *China in the WTO and Beyond: China’s Approach to International Institutions*, 88 TUL. L. REV. 959, 960 (2014) (stating that China joined the WTO on December 11, 2001); Patrick Tani, *The Turkish Republic of Northern Cyprus and International Trade Law*, 12 ASPER REV. INT’L BUS. & TRADE L. 115, 130 (2012) (mentioning that Taiwan joined the WTO on January 1, 2002).

29. TRIPS Agreement, *supra* note 21, at art. 2(1). Parts II, III, and IV refer to “Standards Concerning the Availability, Scope and Use of Intellectual Property Rights,” “Enforcement of Intellectual Property Rights,” and “Acquisition and Maintenance of Intellectual Property Rights and Related Inter-Partes Procedures,” respectively. See *id.* at parts II, III, IV. See also ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE—2007 STATUTORY SUPPLEMENT* 449–50 (Aspen Publishers 2007).

[a]ny person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.³⁰

The subject matters cover patents, utility models, industrial designs, and trademarks. Trademarks, in this instance, does not include service marks.³¹

“Any person” in Article 4(A)(1) includes a national defined in Article 2.³² “Nationals” include “natural persons” and “legal persons.”³³ “Natural persons” are persons of nationality of a member state.³⁴ The law of the member state whose nationality is claimed governs the determination of nationality.³⁵ On the other hand, “legal persons” are categorized into public status and private status.³⁶ “Public status” covers “the States themselves, or State enterprises, or other bodies of *public status*,”³⁷ whose nationality is their country.³⁸ “Private status” covers “corporate bodies of private status, such as companies and associations,”³⁹ whose nationality is defined by the law of the state under which they are established.⁴⁰

“Any person” in Article 4(A)(1) also includes a national as defined in Article 3.⁴¹ For “natural persons,” the “domicile” requirement under Article 3 refers to the “residency” status in any member state other than the member state where a right of priority is claimed.⁴² For “legal persons,” the “domicile” status depends on “the place of their actual headquarters.”⁴³ To claim a right of priority in one member state, the actual headquarter of a legal person under

30. Paris Convention, *supra* note 15, art. 4(A)(1).

31. See BODENHAUSEN, *supra* note 21, at 37.

32. See *id.* at 35.

33. See *id.* at 27–28.

34. See *id.* at 27.

35. *Id.*

36. *Id.* at 27–28.

37. *Id.* at 27.

38. *Id.* at 27–28.

39. *Id.* at 28.

40. *Id.*

41. *Id.* at 35. A member state is allowed to grant to its own nationals a right of priority based on their foreign patent application. *Id.* at 35–36.

42. *Id.* at 33 (“It is generally believed that the Convention has not sought, by using the expression “domicile,” to indicate a legal situation, but rather a more or less permanent situation of fact. The purpose of the provision under consideration would thus be to admit to the benefits of the Convention foreign nationals residing in a country of the Union.”).

43. *Id.* at 34.

Article 3 must be located in any other member state.⁴⁴

In addition, the competence of such Article 4(A)(1) person has to be met at the filing date of the foreign application the right of priority is based on and at the date of claiming the right of priority.⁴⁵

Last, the applicant of the first application may claim a right of priority.⁴⁶ Such applicant may transfer the right of priority to another person (or successor in title) independently in the other member states.⁴⁷ The right of priority may even be transferred to different persons in different countries.⁴⁸ However, after the right of priority is claimed by one application, it becomes “an accessory of such application” and, therefore, cannot be transferred again elsewhere.⁴⁹

2. Periods

“Periods” in Article 4(A)(1) includes time frames for four types of industrial property: patents, utility models, industrial designs, and trademarks.⁵⁰ The periods for patents and utility models are twelve months, while the periods for industrial designs and trademarks are six months.⁵¹ The starting date of a period is the filing date of the first application for an invention, but the starting date is counted in the calculation of the period.⁵² Besides, a period shall be extended if the end of the period is an official holiday or non-working date of the patent office.⁵³

The determination of the first application is a key to the determination of the first filing date and the starting date of a period. Articles 4(A)(2) and 4.A(3) define the first application as what is “duly filed” under Article 4(A)(1).⁵⁴ Under Article 4(A)(2), the first application is “a regular national filing under

44. *Id.*

45. *Id.* at 36 (“The conditions as to the competence of persons to claim the right of priority under the Convention must be fulfilled both at the time of the application on which the right of priority is based and at the time when the right is invoked, but not necessarily during the whole period of priority.”).

46. *See id.* at 37.

47. *See id.* at 37–8.

48. Martin Pflüger & Tihani Prüfer-Kruse, *Paris Convention for the Protection of Industrial Property (Articles 4-6)*, in *CONCISE INTERNATIONAL AND EUROPEAN IP LAW* 210, 216 (Thomas Cottier & Pierre Véron ed., 2011).

49. BODENHAUSEN, *supra* note 21, at 38 (“It remains an independent right until, during, the period of its duration, it is used as the basis for an application in one or more countries of the Union, in which case it becomes an accessory of such application.”).

50. *See* Paris Convention, *supra* note 15, at art. 4(C)(1).

51. *See id.*

52. *See id.* at art. 4(C)(2).

53. *See id.* at art. 4(C)(3).

54. *See* BODENHAUSEN, *supra* note 21, at 40.

the domestic legislation” of a member state.⁵⁵ “A regular national filing” is further defined in Article 4(A)(3)⁵⁶ and means “any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.”⁵⁷ When the first application fulfills the formality requirement of an application under the domestic legislation, it becomes “a regular national filing.”⁵⁸ Moreover, the establishment of the first application is not affected by the consequence of such first application.⁵⁹ Even if the first application is later “withdrawn, abandoned or rejected,” the right of priority still exists.⁶⁰

But, if a subsequent application concerning the same subject is filed in the same member state as the first application, such subsequent application may be considered as the new first application under Article 4(C)(4).⁶¹ Such subsequent application becomes the new first application when four conditions are satisfied at the time of filing the subsequent application.⁶² First, the original first application “has been withdrawn, abandoned, or refused.”⁶³ Second, it has not “laid open to public inspection.”⁶⁴ Third, it does not “leav[e] any rights outstanding.”⁶⁵ Fourth, it has not yet “serve[d] as a basis for claiming a right of priority.”⁶⁶

The third condition is not clear. The United Kingdom Intellectual Property Office (UKIPO) has provided some examples of “any rights outstanding.”⁶⁷ If the original first application is withdrawn, “an outstanding right may be the right to request correction of an erroneous withdrawal.”⁶⁸ If the original first application is abandoned, “the right to request reinstatement” may be an outstanding right.⁶⁹ If the original first application is refused, “an outstanding right may be the right to appeal that decision, or the right to request

55. See Paris Convention, *supra* note 15, at art. 4(A)(2).

56. See BODENHAUSEN, *supra* note 21, at 39.

57. Paris Convention, *supra* note 15, at art. 4(A)(3).

58. See BODENHAUSEN, *supra* note 21, at 40.

59. *Id.*

60. *Id.*

61. *Id.* at 45.

62. *Id.* at 46.

63. Paris Convention, *supra* note 15, at art. 4(C)(4).

64. *Id.*

65. *Id.*

66. *Id.*

67. See UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE [UKIPO], MANUAL OF PATENT PRACTICE §§ 5.28.2, 5.28.3 (July 2014), available at <http://www.ipo.gov.uk/downloads/practice-manual.pdf>.

68. *Id.* § 5.28.2.

69. *Id.*

reinstatement of the application.”⁷⁰ To make sure that “any rights outstanding” have been exhausted, the UKIPO has suggested that the applicant may make an explicit statement that the withdrawal, abandonment, or refusal is done “without leaving any rights outstanding.”⁷¹

Finally, as long as the period of a right of priority is determined,⁷² Article 4(B) provides that a subsequent application that benefits from the right of priority

shall not be invalidated by reason of any acts accomplished in the [period], in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third-party right or any right of personal possession.⁷³

Particularly, “another filing” means another application “during the period of priority cannot invalidate the subsequent filing for which the right of priority is claimed.”⁷⁴ If such “another filing” claims the same subject matter, the court or appropriate authority must invalidate the other filing.⁷⁵

Article 4(B) also mandates that the listed acts “cannot give rise to any third-party right or any right of personal possession.”⁷⁶ That is, all rights created through those listed acts will remain in the applicant, so any challenge of novelty, inventive step, or innovation will not be based on those acts.⁷⁷

B. China’s Problem with the Recognition of a Right of Priority Based on a Taiwan Patent Application

In 1988, China began to allow Taiwanese people to file a patent application by promulgating *Rules of the Mainland Patent Applications Filed by Taiwanese People* (*tai-wan tong-bao lai da-lu shen-qing zhuan-li de ju-ti gui-din*; 台湾同胞来大陆申请专利的具体规定) (1988 Patent Rule), which governs Taiwan citizens’ patent filings in China.⁷⁸ Article 1 of the 1988 Patent Rule provided

70. *Id.*

71. *Id.* § 5.28.3.

72. An applicant needs to meet other requirements so as to claim the right of priority. *See* Paris Convention, *supra* note 15, at arts. 4(D), 4(E), 4(F), 4(G), 4(H), 4(I); *see also* BODENHAUSEN, *supra* note 21, at 46–60.

73. Paris Convention, *supra* note 15, at art. 4(B).

74. BODENHAUSEN, *supra* note 21, at 41.

75. *Id.*

76. Paris Convention, *supra* note 15, at art. 4(B).

77. *See* Pflüger & Prüfer-Kruse, *supra* note 48, at 217–18.

78. *See* 台湾同胞来大陆申请专利的具体规定[Taiwan Compatriots to the Mainland Patent Specified] (promulgated by Chinese Patent Office, Jan. 8, 1988, effective Jan. 8, 1988), *available at*

that Taiwan citizens have the same right to file a patent application under the Chinese patent law as Chinese citizens do.⁷⁹ Regarding a right of priority, Article 3 provided that a Taiwanese applicant may rely on her Chinese application to claim a right of priority in other countries since China joined the Paris Convention.⁸⁰ In 1989, China issued *Supplementary Rule of the Patent Office's Accepting Taiwanese Applicants' Patent Filing* (*zhong-guo zhuan-li-ju guan-yu shou-li tai-bao zhuan-li shen-qing de bu-chong gui-ding*; 中国专利局关于受理台胞专利申请的补充规定) (1989 Patent Supplementary Rule).⁸¹ The 1989 Patent Supplementary Rule permitted a Taiwanese applicant to ask her family members in China to retain a local Chinese patent agent to prosecute her application.⁸²

In 1993, China amended the 1988 Patent Rule (1993 Patent Rule)⁸³ and began to permit a Taiwanese applicant to retain a Chinese patent agent to file a patent application.⁸⁴ In addition, China first addressed the issue of a right of priority by announcing the *Guidelines for the Solutions of Some Problems Caused by the Patent Filing Procedure of the Patent Office Concerning Taiwanese Applicants* (*zhong-guo zhuan-li-ju guan-yu tai-bao shen-qing zhuan-li shou-xu zhong ruo-gan wen-ti*; 中国专利局关于台胞申请专利手续中若干问题的处理办法) (1993 Patent Guideline).⁸⁵ Article 6 of the 1993 Patent Guideline provided two rules regarding a right of priority claimed by a Taiwanese applicant, both of which are based on a prior patent application.⁸⁶ First, Article 6 admitted a right of priority that is based on a prior patent application filed in a member state of the Paris Convention and in China.⁸⁷

<http://law.lawtime.cn/d594788599882.html> (China) (author's translation) [hereinafter 1988 Patent Rule].

79. See *id.* at art. 1.

80. See *id.* at art. 3.

81. See State Patent Office, *Taiwanese Chinese Patent Office Patent Application Supplementary Provisions Concerning the [Failure]*, LEGAL EDUCATION NETWORK (Apr. 19, 1989), <http://www.chinalawedu.com/news/1200/21829/21832/21852/21859/2006/3/zh261349441519360021078-0.htm> (last visited Jan. 15, 2015) (author's translation) [hereinafter 1989 Patent Supplementary Rule].

82. See *id.* at art. 2.

83. See Wang Jing, *Chinese Patent Office on the Issuance of "Taiwan Compatriots on the Admissibility of the Patent Application Rule"* (1993-3-29), CCTV.COM (July 11, 1999), <http://www.cctv.com/news/special/C14328/20050711/102741.shtml> (author's translation) [hereinafter 1993 Patent Rule].

84. See *id.* at art. 4.

85. See 中国专利局关于台胞申请专利手续中若干问题的处理办法 [Chinese Patent Office Approach on Taiwanese Patent Formalities Some Problems] (promulgated by Chinese Patent Office, Apr. 23, 1993, effective May 1, 1993) <http://baike.baidu.com/view/2586662.htm> (China) (author's translation) [hereinafter 1993 Patent Guideline].

86. See *id.* at art. 6.

87. See *id.*

Second, Article 6 denied a right priority that is based on a prior patent application filed in Taiwan.⁸⁸

The 1993 Patent Guideline continued to be applicable after China joined the WTO. China did not permit a Taiwanese applicant to claim a right of priority based on a Taiwan patent application until the implementation of the Cross-Strait IP Agreement. The ultimate question was whether a patent application filed in Taiwan is a foreign patent application or a domestic patent application.⁸⁹

China amended its patent law in 1984 for purposes of joining the Paris Convention, and the revision became effective in 1985 (1985 Patent Law).⁹⁰ Article 29 of the 1985 Patent Law provided that a patent applicant may claim a right of priority based on the filing date of the first application for the same invention filed in a “foreign country” that has an agreement with China, joins the same international treaty with China, or recognizes a right of priority based on a Chinese patent application.⁹¹ In 1992, China amended its patent law again and the amendment became effective in 1993 (1993 Patent Law).⁹² The “right of priority” provision remained the same.⁹³

In preparation to join the WTO, China amended its patent law again in 2000, which became effective on July 1, 2001 (2001 Patent Law).⁹⁴ The “right

88. *See id.*

89. *See* Yue-Feng He & Hua-Hui Fu, *kan-si cuo-wu de ming ti: tai-wan zhuan-li shi guo-nei shen-qing hai-shi guo-wai shen-qing* [It Appears to be False: Taiwan Patent Application is Domestic or Foreign Applications], CHINA INTELL. PROP. NEWS, http://www.cpo.cn.net/zscqb/lilun/t20020225_4134.htm (last visited Mar. 30, 2016) (author’s translation).

90. *See* Ping-Hsun Chen, *China as a Technology Exporter: A Question Mark After the Third Amendment of the China Patent Law in 2009*, 34 EUR. INTELL. PROP. REV. 853, 854 (2012) [hereinafter *China as a Technology Exporter*]. The Chinese version of the 1985 Patent Law can be found at *April 1, 1985, “People’s Republic of China Patent Law,”* CHINA NETWORK, available at http://www.china.com.cn/aboutchina/txt/2009-03/30/content_17523323.htm (last visited Mar. 30, 2016) (author’s translation) [hereinafter 1985 Patent Law].

91. *See* 1985 Patent Law, *supra* note 90, at art. 29, para. 1.

92. *See* Chen, *China as a Technology Exporter*, *supra* note 90, at 855. The Chinese version of the 1993 Patent Law can be found at Patent Law of the People’s Republic of China (adopted by the Standing Comm. Nat’l People’s Cong., Sept. 4, 1992) (China), available at <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn006en.pdf> (author’s translation) [hereinafter 1993 Patent Law].

93. *See* 1993 Patent Law, *supra* note 92, at art. 29, para. 1 (“Where, within 12 months from the date on which any applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.”).

94. *See* Chen, *China as a Technology Exporter*, *supra* note 90, at 856. The Chinese version of

of priority” provision was unchanged.⁹⁵ Because of the “foreign country” requirement, recognizing a right of priority based on an application filed in Taiwan was considered equal to admitting the statehood of Taiwan.⁹⁶ Consequently, China chose to violate the TRIPS Agreement when Taiwan joined the WTO.⁹⁷

The current Chinese patent law was amended in 2008 and became effective in 2009 (2009 Patent Law).⁹⁸ The “right of priority” provision existed without any change.⁹⁹ The policy of denying a right of priority based on a Taiwan application continued until the Cross-Strait IP Agreement was enforced.

III. A RIGHT OF PRIORITY UNDER THE CROSS-STRAIT IP AGREEMENT

A. Cross-Strait IP Agreement as a TRIPS-Minus Treaty

In addition to the WTO framework, FTAs have been used for regional economic integration.¹⁰⁰ While FTAs mainly deal with tariff reductions and elimination of trade restrictions,¹⁰¹ many FTAs have an intellectual property

the 2001 Patent Law can be found at Patent Law of the People’s Republic of China (adopted by the Standing Comm. Nat’l People’s Cong., March. 12, 1984, amended Aug. 25, 2000) (China), *available at* <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn022en.pdf> (author’s translation) [hereinafter 2001 Patent Law].

95. See 2001 Patent Law, *supra* note 94, at art. 29, para. 1 (“Where, within twelve months from the date on which any applicant first filed in a foreign country an application for a Patent for invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for a patent for design, he or it files in China an application for a patent for the same subject matter, he or it may, in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of mutual recognition of the right of priority, enjoy a right of priority.”).

96. See He & Fu, *supra* note 89.

97. See Hsieh, *supra* note 13, at 124–25.

98. See Chen, *China as a Technology Exporter*, *supra* note 90, at 853. The Chinese version of the 2009 Patent Law can be found at Patent Law of the People’s Republic of China (adopted by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, amended Dec. 27, 2008) (China), *available at* <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn028en.pdf> (author’s translation) [hereinafter 2009 Patent Law].

99. See 2009 Patent Law, *supra* note 98, at art. 29, para. 1 (“If, within twelve months from the date the applicant first files an application for an invention or utility model patent in a foreign country, or within six months from the date the applicant first files an application for a design patent in a foreign country, he files an application for a patent in China for the same subject matter, he may enjoy the right of priority in accordance with the agreements concluded between the said foreign country and China, or in accordance with the international treaties to which both countries have acceded, or on the principle of mutual recognition of the right of priority.”).

100. See generally Bryan Mercurio, *Trade Liberalisation in Asia: Why Intra-Asian Free Trade Agreements Are Not Utilised by the Business Community*, 6 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 109, 111–12 (2011).

101. See CHANG-FA LO, WTO-PLUS IN FREE TRADE AGREEMENTS 19–20 (Angle Publishing

chapter to address a higher standard of protection than the TRIPS Agreement.¹⁰²

Generally, IP clauses in FTAs are TRIPS-plus because they offer protection beyond the scope of the TRIPS Agreement.¹⁰³ There are three categories.¹⁰⁴ The first category is a clause addressing new types of intellectual property that are not covered by the TRIPS Agreement.¹⁰⁵ For example, the FTA between Taiwan and Guatemala extends the intellectual property protection to traditional knowledge, folklore, and genetic resources.¹⁰⁶ The FTA between China and Peru also addresses the protection on those subjects.¹⁰⁷

The second category is a clause that requires parties to give up the flexibilities or exceptions allowed by the TRIPS Agreement.¹⁰⁸ For example, the FTA between the United States and Jordan limits unauthorized use of a patent by individuals and entities except for government entities or legal entities on behalf of the government for public non-commercial use, or a national emergency, or other circumstances of extreme urgency.¹⁰⁹ Though, Article 31 of the TRIPS Agreement does not require that.¹¹⁰

The third category is a clause expanding the scope of protection on any of those listed subjects of intellectual property covered by the TRIPS Agreement.¹¹¹ For example, the FTA between the United States and Chile extends the term of copyright protection to no less than the life of the author plus seventy years after the death of the author or to no less than seventy years if the calculation is not based on the life of the author.¹¹² On the other hand, Article 12 of the TRIPS Agreement sets a minimum of fifty years of protection if the protection is not for the life of the author while the term of protection

2010).

102. *Id.* at 68.

103. *Id.* at 67–68.

104. *Id.* at 68.

105. *Id.* at 68–72. The listed intellectual property rights include (1) copyright and related rights, (2) trademarks, (3) geographical indications, (4) industrial designs, (5) patents (including the protection of new varieties of plants), (6) layout-designs (topographies) of integrated circuits, and (7) protection of undisclosed information. *See* WORLD TRADE ORGANIZATION, A HANDBOOK ON THE WTO TRIPS AGREEMENT 247 (Antony Taubman, Hannu Wager, & Jayashree Watal eds., Cambridge University Press 2012) [WORLD TRADE ORGANIZATION, A HANDBOOK].

106. *See* Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 73.

107. *See id.* at 84.

108. *See* LO, *supra* note 101, at 68, 72–77; *see also* Henning Grosse Ruse-khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 325, 358–59 (2011).

109. *See* LO, *supra* note 101, at 73.

110. *See* TRIPS Agreement, *supra* note 21, at art. 31(b).

111. *See* LO, *supra* note 101, at 68, 77–84.

112. *See id.* at 77.

under Article 7 of the Berne Convention for the Protection of Literary and Artistic Works is the life of the author plus fifty years.¹¹³

Contrary to the general FTA practice, the Cross-Strait IP Agreement is not TRIPS-plus and does not fall into any of those three categories. First, the Cross-Strait IP Agreement covers limited subjects: patents, trademarks, copyright, and new varieties of plants.¹¹⁴ Second, the Cross-Strait IP Agreement does not address any issue regarding the flexibilities or exceptions permitted by the TRIPS Agreement. Third, the Cross-Strait IP Agreement does not broaden the protection of those covered subjects.

Rather, it reduces the protection on patents and copyright. The issue of a right of priority is one thing that will be discussed in detail later. Regarding copyright, Article 6 of the Cross-Strait IP Agreement creates a copyright verification mandate specifically for audiovisual works. Article 6 provides that for the publication of an audiovisual work in one country, the other country agrees to assign a relevant association or organization for matters of verification.¹¹⁵ The provision imposes a prerequisite of verification on a copyrighted work when the protection is claimed. Therefore, it violates Article 5(2) of the Berne Convention, which provides, “[t]he enjoyment and the exercise of these rights shall not be subject to any formality.”¹¹⁶ The verification is similar to a registration system for foreign copyright owners, while registration of a foreign copyrighted work as a condition of copyright protection is not permitted under the Berne Convention.¹¹⁷

113. See, e.g., TRIPS Agreement, *supra* note 21, at art. 12; Berne Convention for the Protection of Literary and Artistic Works, art. 7, Sept. 9, 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. Article 7 of the Berne Convention is incorporated in the TRIPS Agreement through Article 9 thereof. See TRIPS Agreement, *supra* note 21, at art. 9.1 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.”).

114. See Cross-Strait Agreement on Intellectual Property Right Protection and Cooperation, China-Taiwan, art. 1, (June 29, 2010), available at <https://www.tipo.gov.tw/ct.asp?xItem=175779&ctNode=6842&mp=2> [hereinafter Cross-Strait IP Agreement]. “New varieties of plants’ are protected under the patent section of the TRIPS Agreement. See TRIPS Agreement, *supra* note 21, at art. 27(3)(b) (“Members may also exclude from patentability: . . . (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.”).

115. See Cross-Strait IP Agreement, *supra* note 114, at art. 6.

116. See Berne Convention, *supra* note 113, at art. 5(2).

117. See Chris Dombkowski, *Simultaneous Internet Publication and the Berne Convention*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 643, 647 (2013) (“The drafters of the Convention defined formalities as legal requirements imposed on authors in order to ensure that the rights of the author came into existence. More precisely, registration and deposit requirements were expressly identified as formalities prohibited under the Convention.”).

Last, the Cross-Strait IP Agreement does not recite the TRIPS Agreement to reaffirm the obligations. Contrarily, both countries did refer to the TRIPS Agreement in their previous FTAs.¹¹⁸ It seems that both countries intentionally ignored their TRIPS obligations when entering the Cross-Strait IP Agreement.

Therefore, the Cross-Strait IP Agreement may be called a TRIPS-minus treaty. The Agreement does not advance the protection and provide something better than the TRIPS Agreement. Rather, it limits the protection of patents and copyright below the TRIPS Agreement.

B. Formality Issues in the Context of the ECFA

Three formality issues have to be highlighted because they indicate that the Cross-Strait IP Agreement is not related to China's obligations under the TRIPS Agreement. First, in addition to no recitation of the TRIPS Agreement, the Cross-Strait IP Agreement is an unusual practice for both countries because it is separated from the ECFA.¹¹⁹ This distinctive feature makes the Cross-Strait IP Agreement more remote from the TRIPS Agreement.

Although the preamble of the ECFA states "in line with the basic principles of the World Trade Organization,"¹²⁰ China has tried to avoid an image that the ECFA is considered a FTA. The ECFA has not been recognized as a FTA by China. China's official website reports information on China's FTAs,¹²¹ but the ECFA is not on the list of China's FTAs.¹²² Besides, while reporting to the WTO the status of the ECFA as a regional trade agreement (RTA) "for which an early announcement has been made," China has never transformed the ECFA to FTA status in the WTO RTAs database.¹²³ Taiwan has treated the ECFA in the same way.¹²⁴ However, the Taiwan's official website of FTAs does list the ECFA as one of Taiwan's FTAs.¹²⁵ This inconsistency creates a

118. See Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 70, 85–86.

119. See *id.* at 63–64.

120. See Cross Strait Economic Cooperation Framework Agreement, Preamble, (June 29, 2010), available at <http://www.ecfa.org.tw/EcfaAttachment/ECFADoc/ECFA.pdf> [hereinafter ECFA].

121. See CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited Mar. 30, 2016).

122. See *China's Free Trade Agreements*, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited Mar. 30, 2016) (showing a list of China's FTAs, which does not include the ECFA).

123. See *China*, WORLD TRADE ORGANIZATION, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=156&lang=1&redirect=1> (last visited Mar. 30, 2016).

124. See *Chinese Taipei*, WORLD TRADE ORGANIZATION, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=158&lang=1&redirect=1> (last visited Mar. 30, 2016).

125. See *FTAs Signed with Trading Partners*, BUREAU OF FOREIGN TRADE, MINISTRY OF ECONOMIC AFFAIRS, <http://www.trade.gov.tw/english/Pages/List.aspx?nodeID=672> (last visited Mar.

question of whether both countries have really entered into a FTA governed by the WTO agreements.

China's attitude toward the ECFA indicates that the Cross-Strait IP Agreement is detached from the TRIPS Agreement. Without reciting the TRIPS Agreement, China does not confirm its duties under the TRIPS Agreement with respect to Taiwan. That shows its consistency of objecting to the application of Article 2(1) of the TRIPS Agreement as well as Article 4 of the Paris Convention to Taiwan nationals.

The second formality issue is that the signing representatives of the ECFA and Cross-Strait IP Agreement are not regular representatives for international affairs or trade affairs in both countries. The formal representative of China for international treaties is the Minister of Commerce (e.g., China-Costa Rica FTA) or the Head of the State (e.g., China-New Zealand FTA). The formal representative of Taiwan for international treaties is the Minister of Economic Affairs (e.g., Taiwan-El Salvador-Honduras FTA), President (e.g., Taiwan-Panama FTA), or Head of a diplomatic delegate (like an embassy).¹²⁶ But, in the ECFA and Cross-Strait IP Agreement, China's representation was the Association for Relations across the Taiwan Straits (海峡两岸经贸交流协会; *hai-xia liang-an jing-mao jiao-liu xie-hui*) (ARATS), while Taiwan's representation was the Strait Exchange Foundation (海峡交流基金會; *hai-xia jiao-liu ji-jin-hui*) (SEF).¹²⁷

The ARATS and SEF were created by China and Taiwan, respectively, to handle the matters related to each other.¹²⁸ The agreements signed by the ARATS and SEF are considered by China as internal agreements.¹²⁹ However, in Taiwan, the agreements are treated as either internal or international affairs, depending on whether KMT or DPP (Democratic Progressive Party) becomes the ruling party based on their different China policies.¹³⁰ While Taiwan has recognized that the SEF is an unavoidable instrument in matters of China,

30, 2016).

126. See Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 68–69. Recently, Taiwan and New Zealand entered into a FTA, where the representative of Taiwan was Taipei Economic and Cultural Office (TECO) in Wellington which is a diplomatic delegate of Taiwan in New Zealand. See Press Release, TECO New Zealand, ANZTEC to Enter into Force (Nov. 20, 2013), http://www.moea.gov.tw/Mns/english/news/News.aspx?kind=6&menu_id=176&news_id=34386 (author's translation).

127. See Davidson, *supra* note 1, at 45.

128. See Ming-Sung Kuo, *W(h)ither the Idea of Publicness? Besieged Democratic Legitimacy under the Extraconstitutional Hybrid Regulation across the Taiwan Strait*, 7 E. ASIA L. REV. 221, 230 (2012).

129. See Kong, *Cross-Taiwan Straight Relations*, *supra* note 2, at 100.

130. See generally Chi Chung, *The Bilateral Investment Treaty between China and Taiwan and its Historical Background*, 5 GEO. MASON J. INT'L COM. L. 107, 119–22 (2014).

China has utilized the ARATS-SEF mechanism as an instrument of consistently denying the statehood of Taiwan in the context of the Cross-Strait relationship. The fact that Taiwan considered the ECFA as a FTA does not change China's policy that the Cross-Strait relationship is merely an internal matter. The ARATS is assigned as a representative for the ECFA and Cross-Strait IP Agreement. The level of the ARATS as a representative is even lower than the level of China's representatives for the Mainland and Hong Kong Closer Economic and Partnership Arrangement (Hong Kong CEPA) and Mainland and Macao Closer Economic and Partnership Arrangement (Macao CEPA), compared to the Hong Kong CEPA and Macau CEPA, China's representative was the Vice Minister of Commerce.¹³¹ Therefore, the ECFA or Cross-Strait IP Agreement is formed as an internal agreement between China and Taiwan. For China, the obligations under both agreements can bypass the WTO review or international law doctrines.

The last formality issue is that the ECFA and Cross-Strait IP Agreement do not have an official English version. This creates a barrier for other WTO members to understand the ECFA and Cross-Strait IP Agreement, because without an English version, the other members cannot figure out whether these two treaties satisfy any requirements under WTO-related agreements. The omission of an official English version is an unusual practice for both countries. When forming a FTA with another state, China or Taiwan always provides an English version for such FTA.¹³² China even provides the English versions of the Hong Kong CEPA and Macau CEPA.¹³³ Contrarily, while Taiwan has offered an English version of the ECFA,¹³⁴ the English version has never been admitted by China. Both countries have never published the English version of the Cross-Strait IP Agreement.

China's effort to detach the ECFA from the WTO framework makes the Cross-Strait IP Agreement more irrelevant to the TRIPS Agreement. Therefore, China's recognition of a right of priority based on a Taiwan patent

131. See, e.g., NEWMAN M. K. LAM & IAN SCOTT, GAMING, GOVERNANCE AND PUBLIC POLICY IN MACAO 230 (Hong Kong University Press 2011); see generally Der-Chin Horng, *The EU Model for a Taiwan-China Free Trade Agreement*, 26 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 35, 52 (2008);

132. See, e.g., *China's Free Trade Agreements*, supra note 122 (showing the links to China's FTAs with the main text, supplements, and news reports); *FTAs Signed with Trading Partners*, supra note 125 (showing the links to Taiwan's FTAs with the main text and supplements).

133. See *Mainland and Hong Kong Closer Economic and Partnership Arrangement*, TRADE AND INDUSTRY DEPT. https://www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html (last visited Mar. 31, 2016); *CEPA*, GOV. OF MACAU, http://www.economia.gov.mo/en_US/web/public/pg_cepa_cepa_i?_refresh=true (last visited Mar. 31, 2016).

134. See ECFA CROSS STRAIGHTS ECONOMIC FRAMEWORK AGREEMENT, HOME PAGE, <http://www.ecfa.org.tw/RelatedDoc.aspx?pid=3&cid=5&pageid=0> (last visited Mar. 30, 2016) (author's translation).

application does not mean that China intends to comply with Article 2(1) of the TRIPS Agreement. The recognition of a right of priority based on a Taiwan application is not a compliance with Article 4 of the Paris Convention.

C. Problematic “Right of Priority” Provision

China’s solution to the permission of a right of priority based on a Taiwan application without admitting Taiwan as a state is Article 2 of the Cross-Strait IP Agreement. Article 2 provides that “[b]oth parties agree to confirm the effectiveness of the first filing date of an application for a patent, trademark, or plant variety of the other party under their own regulations and to actively promote and implement relevant arrangements to protect a right of priority for cross-strait people.”¹³⁵

Article 2 makes a right of priority based on a Taiwan application very limited. First, only “Taiwan nationals” can claim a right of priority based on their Taiwan applications. That is still a violation of Article 4 of the Paris Convention because Article 4 protects “any person” who is a national of a WTO member other than China. Under Article 4, not only Taiwan nationals, but also nationals of a WTO member other than Taiwan and China may claim a right of priority based on their Taiwan application. The “right of priority” provision also violates Article 4 of the TRIPS Agreement, which relates to the doctrine of “Most-Favoured-Nation Treatment” (MFN).¹³⁶ Under Article 4 of the TRIPS Agreement, “[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”¹³⁷ While the grant of “a right of priority based on a Taiwan application” is an obligation China must comply with, such a right of priority is also an advantage, favour, or privilege granted to Taiwan nationals. Thus, under the MFN doctrine, nationals of other third-party WTO members shall enjoy a right of priority based on a Taiwan application filed by them. Otherwise, the MFN doctrine is violated.

IV. CHINA’S IMPLEMENTATION OF THE “RIGHT OF PRIORITY” PROVISION

China has not changed its intellectual property laws to comply with the “right of priority” provision of the Cross-Strait IP Agreement; meanwhile,

135. Cross-Strait IP Agreement, *supra* note 114, at art. 2 (“*shuang-fang tong-yi yi ge-zi gui-ding, que-ren dui-fang zhuan-li, shang-biao ji pin-zhong-quan di-yi-ci shen-qing-ri de xiao-li, bing ji-ji tui-dong zuo-chu xiang-ying an-pai, bao-zhang liang-an ren-min de you-xian-quan quan-yi.*”) (translation provided by author).

136. See WORLD TRADE ORGANIZATION, A HANDBOOK, *supra* note 105, at 17.

137. TRIPS Agreement, *supra* note 21, at art. 4.

Taiwan has done so.¹³⁸ However, China has promulgated three regulations regarding a right of priority claimed by Taiwanese applicants.¹³⁹ Those regulations are only applicable to Taiwanese applicants, but not to Taiwan applications filed by non-Taiwanese entities.¹⁴⁰

A. Patent

On November 15, 2010, the State Intellectual Property Office (SIPO) issued a regulation, *Regulations on Patent Applications for Taiwanese Compatriots* (*guan-yu tai-wan tong-bao zhuan-li shen-qing de ruo-gan gui-ding*; 关于台湾同胞专利申请的若干规定) (2010 Patent Rule), which was issued by Order No. 58 of the SIPO of China.¹⁴¹ Articles 2 to 10 are the provisions governing how a Taiwanese applicant may claim a right of priority based on her Taiwan patent application.¹⁴²

The “right of priority” provisions of the 2010 Patent Rule were structured to be parallel to corresponding provisions in the 2009 Patent Law and Implementing Rule. For instance, the 2010 Patent Rule does not recite Article 29 of the Patent Law as a legal source. However, Article 2 of the 2010 Patent Rule is similar to Article 29 of the 2009 Patent Law, which defines the periods of claiming a right of priority for different types of patent.¹⁴³ Article 4, paragraph 1 of the 2010 Patent Rule is similar to Article 30 of the 2009 Patent Law, which requires the declaration of claiming a right of priority on the filing date and three-month grace period for submitting the documents proving the priority right.¹⁴⁴

138. See Chen, *Cross-Straits Economic Cooperation Framework Agreement*, *supra* note 9, at 95–96.

139. These three regulations can be found at the website of the Taiwan Affairs Office of the State Council of the P.R.C. See *Taiwan-Related Laws and Regulations*, TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL OF THE P.R.C., http://www.gwytb.gov.cn/guide_rules/ (last visited Mar. 30, 2016) (author’s translation).

140. See generally Owen Gee, *Not All Priority Claims Extended by New Cross-Straits Cooperation*, REMARKS CHINA IP UPDATE 2 (Spring 2011), <http://www.marks-clerk.com/MarksClerk/media/MCMediaLib/PDF's/Remarks%20PDFs/Marks-Clerk-ReMarks-China-Spring2011.pdf?ext=.pdf> (“The validity of the following priority claims are yet to be confirmed as allowable: (i) a SIPO application claiming priority from a TIPO application filed by a foreign applicant, unless there is also a co-applicant that is a national or resident of Taiwan or Mainland China.”).

141. See Regulations on Patent Applications for Taiwanese Compatriots (issued by Order No. 58 of the State Intellectual Property Office (SIPO) of China) (promulgated by the State Intellectual Property Office of the People’s Republic of China, Nov. 22, 2010) WIPO Lex. No. CN215 (China), available at <http://www.wipo.int/wipolex/en/details.jsp?id=13446> (however, the WIPO webpage only provides the Chinese version of the regulation) (author’s translation) [hereinafter 2010 Patent Rule].

142. See *id.* at arts. 2, 10.

143. See, e.g., *id.* at art. 2; 2009 Patent Law, *supra* note 98, at art. 29.

144. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 4; 2009 Patent Law, *supra* note 98, at art. 30.

Articles 31 and 32 of the Patent Implementing Rule¹⁴⁵ govern a procedure of claiming a right of priority. Article 31, paragraph 1 of the Patent Implementing Rule requires submission of a certified copy of the prior application and is similar to Article 6, paragraphs 1 and 3 of the 2010 Patent Rule.¹⁴⁶ Article 31, paragraph 2 of the Patent Implementing Rule provides how to correct an error in a form for claiming a right of priority and is similar to Article 4, paragraph 2, Article 5, and Article 6, paragraph 2 of the 2010 Patent Rule.¹⁴⁷ Article 31, paragraph 3 of the Patent Implementing Rule requires proof of the transfer of a right of priority and is similar to Article 7 of the 2010 Patent Rule.¹⁴⁸ Article 32(1) of the Patent Implementing Rule relates to multiple priority rights and is similar to Article 3 of the 2010 Patent Rule.¹⁴⁹ Article 93, paragraph 1(1) and Article 95, paragraph 2 of the Patent Implementing Rule require fee payments and provide consequences of not paying fees are similar to Article 9 of the 2010 Patent Rule.¹⁵⁰ Article 6 of the Patent Implementing Rule relates to the revival of a lost right and is similar to Article 10 of the 2010 Patent Rule.¹⁵¹

There are some provisions in both the 2010 Patent Rule and Patent Implementing Rule that cannot find their equivalent provision in the other Rule. For example, Article 31, paragraph 4 of the Patent Implementing Rule recognizes a right of priority for industrial design based on an application without design description, but does not have a corresponding clause in the 2010 Patent Rule. Patent Implementing Rule does not include a provision similar to Article 6, paragraph 4 of the 2010 Patent Rule either that governs submission of a copy of the prior foreign application for claiming a priority right for another domestic application. Last, the Patent Implementing Rule

145. See Implementing Rules of the Patent Law of the People's Republic of China (promulgated by Decree No. 306 of the State Council of China on June 15, 2001, and revised by the Decision of Jan. 9, 2010, of the State Council on Amending the Rules for the Implementation of the Patent Law of the People's Republic of China) WIPO Lex. No. CN078 (China) (author's translation) [hereinafter Patent Implementing Rule].

146. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 6, paras. 1, 3; Patent Implementing Rule, *supra* note 145, at art. 31, para. 1.

147. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 4, para. 2, art. 5, art. 6, para. 2; Patent Implementing Rule, *supra* note 145, at art. 31, para. 2.

148. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 7; Patent Implementing Rule, *supra* note 145, at art. 31, para. 3.

149. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 3; Patent Implementing Rule, *supra* note 145, at art. 32, para. 1. Article 32, Paragraph 2 of the Patent Implementing Rule relates to a priority right based on a national application.

150. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 9; Patent Implementing Rule, *supra* note 145, at art. 93, para. 1(1), art. 95, para. 2.

151. See, e.g., 2010 Patent Rule, *supra* note 141, at art. 10; Patent Implementing Rule, *supra* note 145, at art. 6.

does not specify a procedure of withdrawing the claim of a right of priority, while Article 8 of the 2010 Patent Rule particularly provides such procedure.

Those features of the 2010 Patent Rule indicate that a right of priority claimed by a Taiwanese applicant is different from a right of priority claimed by a normal applicant. In other words, China shows that it has never granted to a Taiwan applicant a right of priority mandated by the Paris Convention.

B. Trademark

Unlike the implementation with respect to patent filing, the regulations for trademarks and plant varieties are simple. On November 18, 2010, the Trademark Office of the State Administration for Industry and Commerce issued a regulation on the *Matters Regarding a Right of Priority Claimed by a Trademark Registration Application from the Taiwan Region* (*tai-wan di-qu shang-biao zhu-ce shen-qing-ren yao-qiu you-xian-quan you-guan shi-xiang de gui-ding*; 台湾地区商标注册申请人要求优先权有关事项的规定) (2010 Trademark Rule).¹⁵² This is the first trademark regulation specifically for Taiwan applicants. Compared with the 2010 Patent Rule, which has nine provisions related to a right of priority, the 2010 Trademark Rule only has four provisions to handle the same matter.

In 2010, Article 24 of the Chinese trademark law (2001 Trademark Law) provided a right of priority.¹⁵³ Article 24, paragraph 1 defined the eligibility of a claim of a right of priority.¹⁵⁴ Article 24, paragraph 2 provided a three-month grace period for submitting relevant documents.¹⁵⁵ Because Article 24, paragraph 1 of the 2001 Trademark Law had the “foreign country” requirement, as does the Chinese patent law, the 2010 Trademark Rule could not recite that provision. Instead, Article 1 of the 2010 Trademark Rule copied similar wording of Article 24, paragraph 1 of the 2001 Trademark Law, but replaced

152. See About Issued “Taiwan Trademark Registration Applicant Claims Priority Matters Related Provisions” and the Relevant Boo-Style Announcement, TRADEMARK OFFICE OF THE STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE OF THE P.R.C. (NOV. 18, 2010), http://sbj.saic.gov.cn/tz/201011/t20101119_102259.html (author’s translation). The 2010 Trademark Rule can be found in Annex 1.

153. See Trademark Law of the People’s Republic of China, (adopted by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, amended Oct. 27, 2001) WIPO Lex. No. CN026, art. 24 (China) (author’s translation) [hereinafter 2001 Trademark Law].

154. See *id.* at art. 24, para. 1 (“Where an applicant, within six months from the date he applies for registration of his trademark for the first time in a *foreign country*, again applies in China for registration of one and the same trademark for the same *goods*, he may, in accordance with any agreement concluded between the *foreign country* concerned and the People’s Republic of China or any international treaty to which both countries are parties, or on the basis of the priority principle mutually accepted, enjoy priority.” (emphasis added)).

155. See *id.* at art. 24, para. 2.

“foreign country” with “Taiwan region.”¹⁵⁶ As for other requirements, Article 2 of the 2010 Trademark Rule simply referred to Article 24, paragraph 2 of the 2001 Trademark Law and Article 20, paragraph 1 of the 2002 Trademark Implementing Rule.¹⁵⁷

The simple structure of the 2010 Trademark Rule results in a limited claim of a right of priority for a Taiwanese trademark applicant. The 2001 Trademark Law governs not only trademarks for goods, but also service trademarks (service marks).¹⁵⁸ Although the text of Article 24, paragraph 1 covers only “trademarks for goods,” “service trademarks” still benefit from Article 24 because Article 4, paragraph 3 provides that “[p]rovisions regarding the goods trademarks in this Law shall be applicable to service trademarks.”¹⁵⁹ Similar to Article 24, paragraph 1 of the 2001 Trademark Law, Article 1 of the 2010 Trademark Rule only mentions “goods trademarks.” But, there is no provision in the 2010 Trademark Rule reciting Article 4, paragraph 3 of the 2001 Trademark Law. Therefore, relying on the 2010 Trademark Rule, a Taiwanese applicant can only base a right of priority on a Taiwan trademark application designated to a category of goods.

The failure to protect service trademarks is actually a violation of the MFN treatment under the TRIPS Agreement. Article 4 of the TRIPS Agreement mandates each member state to treat the nationals of all other member states equally in term of intellectual property protection.¹⁶⁰ Because foreign applicants other than Taiwanese applicants may claim a right of priority for their service trademark applications in China, Taiwanese applicants are discriminated against. Taiwanese applicants cannot enjoy a right of priority for their service trademark applications like a national of any other WTO member state can under the Chinese trademark law. Therefore, by not referring to

156. See, e.g., 2010 Trademark Rule, *supra* note 152, at art. 1; 2001 Trademark Law, *supra* note 153, at art. 24, para. 1.

157. See 2010 Trademark Rule, art. 2. The 2002 Trademark Implementing Rule (a.k.a. Regulations for the Implementation of the Trademark Law of the People’s Republic of China) was issued on Aug. 3, 2002 and became effective on Sept. 15, 2002. See Regulations for the Implementation of the Trademark Law of the People’s Republic of China (promulgated by Order No. 358 of Aug. 3, 2002, of the State Council of People’s Republic of China) WIPO Lex. No. CN018 (China) (author’s translation).

158. See 2001 Trademark Law, *supra* note 153, at art. 3 (“Registered trademarks refer to trademarks that are registered with the approval of the Trademark Office, including trademarks for goods and services, collective trademarks and certification trademarks.”).

159. See *id.* at art. 4, para. 3.

160. See TRIPS Agreement, *supra* note 21, at art. 4 (“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”); see also Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT’L L.J. 345, 351-52 (2009).

service trademarks in the 2010 Trademark Rule, China violates the MFN treatment.

Moreover, when the Chinese trademark law was amended in 2013,¹⁶¹ Article 24 of the 2001 Trademark Law was changed to Article 25.¹⁶² But, the Trademark Office has not made any amendment to the 2010 Trademark Rule. This indicates China's carelessness about trademark filing of Taiwanese applicants.

C. Plant Variety

Regarding plant varieties, on November 22, 2010, the Ministry of Agriculture announced *Provisional Measures on Application from Taiwan Applicants for Plant Variety Rights in the Mainland* (*guan-yu tai-wan di-qu shen-qing-ren zai da-lu shen-qing zhi-wu xin-pin-zhong-quan de zhan-xing gui-ding*; 关于台湾地区申请人在大陆申请植物新品种权的暂行规定),¹⁶³ including an official English version (2010 Plant Variety Rule).¹⁶⁴ The 2010 Plant Variety Rule provides guidance for Taiwan applicants. It is the first regulation of the Ministry of Agriculture regarding Taiwan applicants for plant varieties. It has ten provisions where only Article 5 relates to the claim of a right of priority.¹⁶⁵

In 2010, the Chinese plant variety law (1997 Plant Variety Law)¹⁶⁶ included Article 23 addressing a procedure of claiming a right of priority. Article 23, paragraph 1 provided a twelve-month period during which a right of priority may be claimed.¹⁶⁷ Article 23, paragraph 1 also included the "foreign country"

161. See Trademark Law of the People's Republic of China (as amended up to Decision of Aug. 30, 2013, of the Standing Comm. Nat'l People's Cong. on Amendments to the Trademark Law of the People's Republic of China), WIPO Lex. No. CN 195 (China) (author's translation) [hereinafter 2013 Trademark Law].

162. See *id.* at art. 25.

163. See Announcement No. 1487: About Taiwan in the Mainland Applicant Interim Provisions on New Plant Varieties, DEPARTMENT OF SCIENCE, TECHNOLOGY AND EDUCATION, MINISTRY OF AGRICULTURE OF THE P.R.C., (Nov. 25, 2010), http://www.stee.agri.gov.cn/gdxw/t20101125_838330.htm (author's translation).

164. See Provisional Measures on Application from Taiwan Applicants for Plant Variety Rights in the Mainland, WIPO Lex. No. CN172 (China) (author's translation) [hereinafter 2010 Plant Variety Rule].

165. See *id.* at art. 5.

166. See Regulations of the People's Republic of China on Protection of New Varieties of Plants (promulgated by Order No. 213 of March 20, 1997, of the State Council of People's Republic of China) WIPO Lex. No. CN008 (China) (author's translation) [hereinafter 1997 Plant Variety Law]. The 1997 Plant Variety Law was enacted on Mar. 20, 1997 and became effective on Oct. 1, 1997. See *id.*

167. See *id.* at art. 23, para. 1 ("Where, within 12 months from the date on which any applicant has first filed an application for variety rights in a foreign country, the said applicant files an application for variety rights in China in respect of the same new plant variety, he or it may, in accordance with

requirement.¹⁶⁸ Article 23, paragraph 2 provided the formality requirements for claiming a right of priority, such as a three-month grace period of document submission.¹⁶⁹ On the other hand, Article 5 of the 2010 Plant Variety Rule had one paragraph that combined two paragraphs of Article 23 of the 1997 Plant Variety Law, however, it did so without reciting the “foreign country” requirement.¹⁷⁰

Moreover, at that time, the Implementing Rule of the Chinese plant variety law (2008 Plant Variety Implementing Rule)¹⁷¹ included Article 25, which addressed the formality of declaring a right of priority.¹⁷² On the other hand, Article 9 of the 2010 Plant Variety Rule referred to the 2008 Plant Variety Implementing Rule as a source for the matters regarding plant variety applications. Thus, the declaration requirement under the 2008 Plant Variety Implementing Rule was actually incorporated in the 2010 Plant Variety Rule.

In 2013, the Chinese plant variety law was amended,¹⁷³ and Article 23 was kept the same.¹⁷⁴ The implementing rule was later amended in 2013,¹⁷⁵ and Article 25 remained unchanged.¹⁷⁶

any agreement concluded.”).

168. *See id.* at art. 23, para. 1.

169. *See id.* at art. 23, para. 2.

170. *See* 2010 Plant Variety Rule, *supra* note 164, at art. 5.

171. *See* Implementing Rules of Aug. 25, 2007, for the Regulations of the People’s Republic of China on the Protection of New Varieties of Plants (Agriculture Part) (promulgated by Order No. 5 of Ministry of Agriculture of Sept. 19, 2007) WIPO Lex. No. CN030 (China) (author’s translation) [hereinafter 2008 Plant Variety Implementing Rule]. The 2008 Plant Variety Implementing Rule was issued on Sept. 19, 2007 and became effective on Jan. 1, 2008. *See id.*

172. *See id.* at art. 25.

173. *See* Regulation of the People’s Republic of China on Protection of New Varieties of Plants (promulgated by Order No. 213 of the State Council on Mar. 20, 1997, and revised by the Decision of Jan. 31, 2013, of the State Council Amending the Regulation of the People’s Republic of China on Protection of New Varieties of Plants), WIPO Lex. No. CN210 (China) (author’s translation) [hereinafter 2013 Plant Variety Law].

174. *See id.* at art. 23.

175. *See* Implementing Rules for the Regulations of the People’s Republic of China on the Protection of New Varieties of Plants (Agriculture Part) (promulgated by Order No. 5 of the Ministry of Agriculture of the People’s Republic of China, Sept. 19, 2007, revised by Order No. 4 of the Ministry of Agriculture of the People’s Republic of China, Dec. 31, 2011 for the first time, and revised by Order No. 3 of the Ministry of Agriculture of the People’s Republic of China, Apr. 25, 2014 for the second time) WIPO Lex. No. CN363 (China) (author’s translation) [hereinafter 2014 Plant Variety Implementing Rule].

176. *See* 2014 Plant Variety Implementing Rule, *supra* note 175, at art. 25.

D. Role of the Taiwan Intellectual Property Office

In 2014, the Taiwan Intellectual Property Office (TIPO) began to issue a monthly report or presentation on its website.¹⁷⁷ Each report (either in a WORD file or PPT file) briefs the implementation of the Cross-Strait IP Agreement.¹⁷⁸

In the November 2014 report, the TIPO wrote,

With respect to whether “Priority Claim Rights” (Article 2) apply to branch company or constituent company of foreign enterprises in Taiwan, since the emphasis of the Agreement is to protect enterprises and residents in and of Taiwan, as long as they are a juridical person of Taiwan (e.g., Siemens Taiwan), they may claim priority rights with mainland China. Furthermore, if one of the applicants in a multiple-applicant case is a Taiwanese national and filed as first applicant, such application may request for priority claim with mainland China, regardless of the nationality of the remaining applicants.¹⁷⁹

This statement explains three rules. First, a branch office or subsidiary of a foreign company cannot benefit from the Cross-Strait IP Agreement. Second, a child company of a foreign company incorporated under the Taiwan corporate law may enjoy the protection under the Cross-Strait IP Agreement. Third, if multiple applicants file an application, at least one of whom is a Taiwan applicant, a right of priority may be granted to such application.

The behavior of the TIPO by giving that interpretation is very abnormal because the TIPO acts as a subsidiary of any corresponding administrative agency of China to interpret the regulation regarding a right of priority claimed by a Taiwan applicant based on her Taiwan application. On the other hand, the SIPO, Trademark Office, or Ministry of Agriculture has never announced any rule interpretation about those three rules.

Even the TIPO’s interpretation is true, China still violates Article 4 of the Paris Convention because a right of priority based on a Taiwan application should be granted to nationals of any WTO member other than Taiwan.

177. The reports can be found at *Advocacy Seminar*, Ministry of Economic Affairs Intellectual Property Office, <http://www.tipo.gov.tw/lp.asp?ctNode=6792&CtUnit=3295&BaseDSD=7&mp=1> (last visited Mar. 30, 2016). But, the TIPO will remove previous reports regularly.

178. When this article was originally finished on Aug. 17, 2014, the TIPO had posted the January, February, March, April, May, and June 2014 Reports, but, these old reports are all removed now.

179. A copy of the Nov. 2014 Report is on-file with the Marquette Intellectual Property Law Review. TAIWAN INTELLECTUAL PROPERTY OFFICE, CROSS-STRAIT COOPERATION IN THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AGREEMENTS, EFFECTIVENESS OF THE IMPLEMENTATION § A.2.c (Nov. 2014).

V. CONCLUSION

A real right of priority must be based on Article 4 of the Paris Convention. To comply with the Article 4 requirements, China must grant a right of priority based on a prior application filed in another member state to a national of any member state other than China, if other formality requirements are also met. As a member of the WTO, China should follow Article 2(1) of the TRIPS Agreement, which requires a member to comply with Article 4 of the Paris Convention. As a result, China should permit a Taiwanese applicant to claim a right of priority based on her Taiwan application without entering into the Cross-Strait IP Agreement with Taiwan. An applicant of the nationality of any other WTO member should also enjoy a right of priority based on her Taiwan application. However, China intentionally ignores such duty.

The Cross-Strait IP Agreement does not save China's violation of the TRIPS Agreement because a right of priority is granted only to Taiwanese applicants. In fact, China has never tried to comply with Article 4 of the Paris Convention. The separation of the Cross-Strait IP Agreement from the ECFA indicates the signing of either the Cross-Strait IP Agreement or ECFA is not a matter of signing a FTA. Refusal to admit the FTA status of the ECFA and the lack of recitation of the TRIPS Agreement in the Cross-Strait IP Agreement indicates that China is still not in compliance with TRIPS, despite the conclusion of the Cross-Strait IP Agreement. As a result, China's consistency of denying a Taiwan applicant's right of priority based on a Taiwan application under Article 4 of the Paris Convention remains.